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International Bulk Carriers Spa v CTI Group Inc

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–2790–12 OF 2013
ABDUL WAHAB PATAIL, AZAHAR MOHAMED AND HAMID SULTAN JJCA
11 JULY 2014

Arbitration — Enforcement — Foreign award — Award registered by High Court even though evidence of arbitration agreement between parties not produced — Arbitration Act 2005 ('AA') s 38(2)(b) — Whether registration a nullity — Whether party adversely affected could set aside registration as of right without having to rely on provisos to s 39 of the AA — Whether no rule of law to say that in such cases application to set aside registration must be made under s 39 of the AA and not pursuant to s 38 itself

The respondent successfully applied to the High Court to register a foreign arbitral award it had obtained in its favour against the appellant. At the registration proceedings, made pursuant to s 38 of the Arbitration Act 2005 ('the AA'), the appellant objected to the registration saying, inter alia, that it had no arbitration agreement with the respondent and that the respondent had failed to produce any evidence of same as it was mandatorily required to do under s 38(2)(b) of the AA. The arbitration arose in exercise of an arbitration clause contained in a share transfer agreement ('STA') signed between the respondent and three other parties. The appellant was not a party to, and did not sign, the STA. However, it signed two annexures ('annexures 6 and 7') to the STA which were, respectively, a guarantee cum assignment and a pledge. Under annexure 6, the appellant was both a guarantor as well as an assignee of a debt owed by three of the parties to the STA to the fourth party/seller of certain shares whilst annexure 7 was the appellant's pledge that the guaranteed sum would be deposited into a bank account as security for the seller. When a dispute arose between the parties to the STA, the respondent and another party referred the matter to arbitration and cited the appellant as one of the respondents thereto. Although it initially objected to being included in the proceedings, the appellant later submitted counterclaims which were taken into account by the arbitral tribunal. In its final award, which was the subject of the High Court registration, the tribunal held the appellant liable. In allowing the registration of the award, the High Court held that although annexures 6 and 7 themselves did not specifically provide that the parties to it were bound by the arbitration clause contained in the STA, the two annexures made clear reference to the STA. In turn, the STA stated that the annexures were 'an integral part' of the agreement. As such, the High Court ruled, the arbitration agreement in the STA bound the appellant. The court also held that

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since the STA was produced at the registration proceedings, the failure to also produce annexures 6 and 7 was irrelevant. The issues in the instant appeal against the High Court's decision was whether the registration of the award was valid when the two annexures were not produced and whether the arbitral award could be registered when the appellant's name did not appear in the arbitration agreement.

Held, allowing the appeal with costs and setting aside the registration of the arbitral award:

(1) The registration of the award on the facts of the instant case was ab initio a nullity liable to be set aside as of right without any need for the appellant to rely on the provisos stated in s 39 of the AA (see para 8 (d)).

(2) The appellant was not a signatory to the agreement in any manner nor did it have any form of nexus as provided for in ss 9(1)–(5) of the AA. Consequently, prima facie the award could not be registered pursuant to s 38 as the 'arbitration agreement' under s 38(2)(b) of the AA must necessarily refer to signatories or at least to persons referred to in ss 9(1)–(5) of the AA (see para 7(a)).

(3) The registration of an arbitral award under 38 of the AA could be set aside as of right if the conditions stated in that section had not been satisfied. There was no obligation to make an application under s 39 to set aside the registration even though the applicant could satisfy one of the criteria in that section. The law did not prohibit an application to set aside from being made both under s 38 as well as s 39. The argument that the setting aside of the registration of the award could only take place pursuant to s 39 of the AA had no merit when there were flaws in the registration especially when the mandatory requirement of s 38 had not been complied with on the face of the record (see para 8 (c)).

(4) Strict compliance with the provisions of the AA was required when a party was given the privilege and benefit of registering a foreign award which could only be challenged in the limited circumstances set out in s 39 of the AA. The doors for registration could not be widely opened by judicial fiat more so when it was not provided for by Parliament (see para 8 (b)).

[Bahasa Malaysia summary

Responden berjaya memohon ke Mahkamah Tinggi untuk mendaftar award timbang tara asing yang telah diperolehi bagi pihaknya terhadap perayu. Di prosiding pendaftaran, menurut s 38 Akta Timbang Tara 2005 ('AT'), perayu membantah kepada pendaftaran mengatakan, antara lain, bahawa ia tidak mempunyai perjanjian timbang tara dengan responden dan bahawa responden telah gagal untuk mengemukakan apa-apa keterangan terhadap yang sama kerana ia adalah keperluan mandatori untuk berbuat demikian di bawah

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s 38(2)(b) AT. Timbang tara timbul dalam pelaksanaan satu klausa timbang tara yang terdapat dalam satu perjanjian pemindahan saham ('STA') yang ditandatangani antara reponden dan tiga pihak yang lain. Perayu bukan salah satu pihak, dan tidak menandatangani, STA tersebut. Walau bagaimanapun, ia telah menandatangani dua lampiran (lampiran 6 dan 7) STA yang mana, masing-masing, satu ikrar jaminan merangkap penyerahhakan. Di bawah lampiran 6, perayu adalah kedua-dua penjamin dan juga penerima serah hak kepada hutang yang terhutang oleh tiga pihak kepada STA terhadap pihak keempat/penjual beberapa saham manakala lampiran 7 adalah ikrar perayu bahawa jumlah wang yang dijamin akan didepositkan ke dalam satu akaun bank sebagai jaminan untuk penjual. Apabila pertikaian timbul antara pihak-pihak kepada STA, responden dan pihak satu lagi merujuk perkara itu ke timbang tara dan menamakan perayu sebagai salah seorang responden-responden tambahan. Walaupun ia pada awalnya membantah untuk dimasukkan di dalam prosiding, perayu kemudian mengemukakan tuntutan balas yang mana telah dipertimbangkan oleh tribunal timbang tara. Dalam award muktamad, yang mana merupakan perkara pendaftaran Mahkamah Tinggi, tribunal memutuskan perayu bertanggungjawab. Dalam membenarkan pendaftaran award, Mahkamah Tinggi memutuskan bahawa walaupun lampiran 6 dan 7 sendiri tidak memperuntukkan bahawa pihak-pihak kepadanya adalah terikat dengan klausa timbang tara terdapat di dalam STA, dua lampiran itu membuat rujukan yang jelas terhadap STA. Seterusnya, STA menyatakan bahawa lampiran-lampiran itu adalah 'an integral part' kepada perjanjian. Oleh itu, Mahkamah Tinggi memerintahkan, perjanjian timbang tara di dalam STA mengikat perayu. Mahkamah juga memutuskan bahawa memandangkan STA telah dikemukakan di prosiding pendaftaran, kegagalan untuk mengemukakan lampiran 6 dan 7 adalah tidak relevan. Isu-isu dalam rayuan ini terhadap keputusan Mahkamah Tinggi adalah sama ada pendaftaran award adalah sah apabila dua lampiran itu tidak dikemukakan dan sama ada award timbang tara boleh didaftarkan apabila nama perayu tidak ada di dalam perjanjian timbang tara.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan pendaftaran award timbang tara:

(1) Pendaftaran award pada fakta kes ini adalah *ab initio* suatu pembatalan yang bertanggungan untuk diketepikan sebagai hak tanpa apa-apa keperluan untuk perayu bergantung kepada proviso-proviso yang dinyatakan di dalam s 39 AT (lihat perenggan 8(d)).

(2) Perayu bukanlah penandatangan kepada perjanjian dalam apa-apa cara juga tidak ia mempunyai apa-apa hubungan seperti yang diperuntukkan di dalam s 9(1)–(5) AT. Oleh itu, secara prima facie award itu tidak boleh didaftarkan menurut s 38 kerana 'arbitration agreement' di bawah s 38(2)(b) AT semestinya perlu merujuk kepada penandatangan atau

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sekurang-kurangnya orang yang dirujuk di dalam s 9(1)–(5) AT (lihat perenggan 7(a).

(3) Pendaftaran award timbang tara di bawah s 38 AT tidak boleh diketepikan sebagai hak jika terma-terma yang dinyatakan di dalam seksyen itu tidak dipenuhi. Tiada kewajipan untuk membuat suatu permohonan di bawah s 39 untuk mengetepikan pendaftaran walaupun pemohon boleh memenuhi satu daripada kriteria di dalam seksyen itu. Undang-undang tidak menghalang permohonan untuk mengetepikan daripada dibuat di bawah kedua-dua s 38 dan juga s 39. Hujahan bahawa pengetepian pendaftaran award hanya boleh dibuat menurut s 39 AT adalah tidak bermerit apabila tiada kecacatan di dalam pendaftaran terutama apabila keperluan mandatori s 38 tidak dipenuhi di muka rekod (lihat perenggan 8(c)).

(4) Pematuhan ketat dengan proviso-proviso AT adalah perlu apabila pihak telah diberikan keutamaan dan faedah mendaftarkan award asing yang hanya boleh dicabar dalam keadaan terhad yang dinyatakan dalam s 39 AT. Peluang untuk pendaftaran tidak boleh dibuka dengan luas oleh fiat kehakiman lebih-lebih lagi apabila ia tidak diperuntukkan oleh Parlimen (lihat perenggan 8(b)).]

Notes

For cases on foreign award, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1927–1930.

Cases referred to

Badiadin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 0793; [2010] 5 CLJ 83, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 9(1) , (2), (3), (4), (5), 38, 38(2)(b), 39

Appeal from: Civil Suit No LBN-–24—8/7 of 2013 (High Court, Labuan)

Arunachalam Kasi (Valliammai Kasi and Lee Hui Ching with him)(Esther Ong, Tengku Saiful & Sree) for the appellant.

Oommen Koshy (Premman Gopal, Foo Siew Li with him) (Skrine & Co) for the respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's (the defendant's) appeal in respect of registration of foreign arbitration award came up for hearing on 28 April 2014 and upon

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hearing submissions, we reserved judgment to 26 June 2014. My learned brothers Abdul Wahab bin Patail JCA and Azahar bin Mohamed JCA have read the draft judgment. This is our judgment.

BRIEF FACTS

[2] The respondent ('the plaintiff') had obtained a final award in its favour from the International Court of Arbitration in Paris under the Rules of the International Chamber of Commerce. It is not in dispute that the defendant is not a party to the agreement but the arbitration tribunal had considered the issue and based on the documents had ruled that the defendant is liable notwithstanding the defendant did not participate in the arbitration hearing.

[3] The learned trial judge had meticulously summarised the facts. To save judicial time we reproduce the facts which reads as follows:

> The dispute between the parties originated from an agreement known as the Share Transfer Agreement (STA) which was executed between the plaintiff and several parties. It contains an arbitration clause. The defendant herein is not one of the parties to the STA. The parties who executed the STA are CNAN Group SPA (CNAN), Pharaon Commercial Investment Group Limited (Pharaon), Mr. Mustapha Abdelwahab Laradji (Laradji) and CTI Group Inc (the plaintiff). The backdrop to the STA is as follows. CNAN are ship owners. Some of their ships were owned through International Bulk Carrier SPA (the defendant). Pharaon is involved in sea transportation business. The plaintiff is also a ship owning company. Mr. Laradji is an Algerian businessman. Under the terms of the STA executed on 27th September 2007, CNAN sold 51% of its shares in the defendant to Pharaon, Laradji and the plaintiff in the proportion of 24.5 %, 24%5 and 2% respectively. The defendant was a wholly owned subsidiary of CNAN at the time. The total price of the shares was USD9,282,000.00. The purchasers paid USD6,832,000.00 upon signing of the STA. The balance of USD2,450,000.00 20 was to be paid in five installments over a five-year period. The plaintiff, Pharaon and Laradji also agreed to grant a loan of USD5 million to the defendant. A clause in the STA stated that the defendant would guarantee the payment of the balance of the purchase price of USD2,450,000.00 to CNAN by the plaintiff, Pharaon and Laradji. In the same guarantee clause, it was stated that the plaintiff, Pharaon and Laradji would assign a part of the debt-claim to CNAN which is limited to the sum of USD2,450,000.00 which is the balance of the purchase price. This guarantee and assignment is referred to in Annex 6 to the STA which was signed by the defendant. It is also stated in the guarantee clause that the defendant would deposit the said guaranteed sum of USD2,450,000.00 into a bank account and pledge the same as security in favour of CNAN. This pledge is referred to in Annex 7 to the STA which was also signed by the defendant. Thus in Annex 6 and 7, the defendant acknowledged its rights and obligations that were created by the STA. It must also be noted that Annex 6 and 7 were signed by the defendant on the same date as the STA.
>
> Pursuant to the sale of the said shares, the defendant's vessels were chartered to the plaintiff under the terms and conditions of the STA. The STA states that the

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'Appendices' shall bind the parties in the same manner as the STA and shall constitute 'an integral part' thereof. The STA contained an arbitration clause to refer dispute between the parties in the event of dispute to the International Chamber of Commerce. A dispute arose between the parties in respect of the initial loan of USD5 million granted by Pharaon and the plaintiff to the defendant and reimbursement costs of repairs to three vessels. The principal sum claimed as reimbursement by Pharaon and the plaintiff was USD11,522,546.18. In accordance with clause 11.4 of the STA, the plaintiff and Pharaon commenced arbitration proceedings in France against CNAN, the defendant and Laradji. The arbitration proceedings lasted two years. The defendant initially objected to the proceedings on the ground of lack of jurisdiction. However, the defendant did not ask for an Interim Award. Nonetheless, the defendant raised new counterclaims against the plaintiff which were outside the terms of reference. The Arbitration Tribunal allowed the addition of new counterclaims. The Arbitration Tribunal overruled the objection on lack of jurisdiction. The Arbitration Tribunal noted that the defendant did not raise the jurisdictional objection in later submissions and by submitting counterclaims, it had unconditionally recognized the jurisdiction of the Arbitration Tribunal. The Arbitration Tribunal also considered Annex 6 and 7 which created rights and obligations in respect of the defendant.

[4] The relevant sections of the Arbitration Act 2005 ('AA 2005') which need consideration are ss 9, 38 and 39.

Section 9

9(1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained in:

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

Section 38

38(1) On an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

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(2) In an application under subsection (1) the applicant shall produce:

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, 'foreign State' means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

Section 39

39(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:

(a) where that party provides to the High Court proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

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(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

[5] The central issues before us are (a) whether the registration of the award was valid when the annexure to the arbitration was not produced before the court for purpose of registration of the award under s 38 of the Act; (b) whether an award can be registered when the defendant's name does not appear in the arbitration agreement, pursuant to s 38 to be read with s 9 of the Arbitration Act.

[6] The learned trial judge has articulated his views on these two issues and it reads as follows:

Counsel for the defendant cited the English Court of Appeal case of *Aughton v M F Kent* [1991] 1 57 BLR and submitted that distinct and specific words were required to incorporate an arbitration clause by reference to another document and deprive a party of the ordinary right of access to the court in exchange for a right to arbitrate. Counsel for the defendant also cited the case of *Star-Trans v Norske-Tech* [1996] 2 SLR 409 where the Singapore Court of Appeal held an arbitration clause in a different contract is not to be incorporated by reference into the contract unless clear words of incorporation are used. Annex 6 and 7 which is executed by the defendant makes reference to the STA. However, Annex 6 and 7 which are essentially a contract of guarantee and a deed of pledge do not specifically provide that the parties to it are bound by the arbitration clauses contained in the STA. Counsel for the plaintiff on the other hand cited the case of *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625 where our Federal Court held that specific reference to the arbitration clause in another document is not necessary. In that case, the Sales Contracts made a clear reference to the Standard Terms and Conditions (STC) that contained an arbitration clause. However, there was no specific reference to the arbitration clause and the STC was not attached to the Sales Contracts. The Federal Court said as follows:

> We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.

In the instant case, the Annex 6 and 7 make clear reference to the STA which contains an arbitration clause. The STA itself contains provisions that state that the appendices (which include Annexes 6 and 7) are integral to it. Clause 1.1 defines 'Appendices' as:

> *the numbered documents, the copies or originals of which have been duly initialled by*

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the Parties and annexed to this Share Sale Agreement and which constitute integral part hereof. (Emphasis added.)

Clause 1.2 of the STA, in part, provides as follows:

The Preamble and the Appendices shall bind the Parties in the same manner as this agreement, of which they constitute an integral part ... (Emphasis added.)

In *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd*, the Federal Court considered sub-section (5) of section 9 that provides that an arbitration agreement can be incorporated by reference only if:

... the reference is such as to make that clause part of the agreement.

To recapitulate, Annex 6 and 7 referred to the STA which conferred benefit as well as imposed obligations on the defendant. The STA itself stated that the Annex 6 and 7 are integral to it. The STA contained an agreement to arbitrate. Furthermore, on the evidence, the Arbitration Tribunal noted that the defendant could not have been unaware of the STA when it executed Annex 6 and 7 which are integral parts of the STA. In the premises, I am inclined to accept the argument of counsel for the plaintiff that the arbitration agreement in the STA binds the defendant. I also find that it is irrelevant that the plaintiff did not produce Annex 6 and 7 when they applied to registered the Final Award under section 38. This is because the relevant arbitration agreement is contained in the STA.

[7] The two issues which are glaringly obvious are:

(a) the defendant is not a signatory to the agreement in any manner or has any form of nexus as provided for in s 9(1) to (5) of the Arbitration Act 2005 and in consequence prima facie it cannot be registered pursuant to s 38 as arbitration agreement under s 38(2)(b) must necessarily refer to signatories or at least to persons referred to s 9(1) to (5) of the Act;

(b) the second issue which is debatable is whether a part of the agreement is sufficient or the whole agreement inclusive of the enclosure is necessary for the purpose of registration is mandatory. On this issue the respondents despite our request was not able to produce any relevant authorities or point to assist the court.

[8] We have read the appeal record and the submissions of the parties in detail. We take the view the appeal should be allowed. Our reasons, inter alia, are as below:

(a) We have gone through the meticulous as well as commendable judgment of the learned judge and authorities relied for coming to the reasoned judgment. We are of the considered view that the authorities do not deal with the issues faced in the instant case.

(b) It is trite the parties relying on the provision of the AA 2005 must strictly comply with the provisions of the Act and more so when they are given

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exclusive privilege and benefit to register a foreign award which can only be challenged in a limited circumstances as set out in s 39. The doors for registration cannot be widely opened by judicial fiat more so when it is not provided for by Parliament (see *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 0793; [2010] 5 CLJ 83).

(c) The plaintiff's argument that the setting aside the award can only take place pursuant to s 39 of the Act does not have merit when there are flaws in the registration of the award under s 38, more so when the mandatory requirement of s 38 is not complied with on the face of the record. In consequence, an award registered under s 38 can be set aside as of right if the conditions stated in the section is not satisfied and there is no obligation to make an application under s 39 to set aside an award even though the applicant can satisfy one of the criteria in the said section. In addition, the law does not prohibit an application to be made both under s 38 as well as 39.

(d) The registration of the award on facts of the instant case is ab initio a nullity and ought to be set aside as of right without any need for the defendant to rely on the provisos stated in s 39 (see *Badiadin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393).

[9] For reasons stated above, we allow the appeal with costs. The registration of the award is set aside. Costs to be fixed at RM25,000 in the Court of Appeal and RM25,000 for the court below as agreed by the parties. Deposit to be refunded.

Appeal allowed with costs and registration of the arbitral award set aside.

Reported by Ashok Kumar